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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No.....

FORD MOTOR COMPANY,
Petitioner

vs.

GORDON FORM LATHE COMPANY,
Respondent

PETITION FOR WRIT OF CERTIORARI

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Ford Motor Company, respectfully prays that a writ of certiorari issue to review a judgment of the United States Circuit Court of Appeals for the Sixth Circuit, entered February 4, 1943, in the above entitled cause.

Certified transcript of the record in the case, including the proceedings in the Circuit Court of Appeals, is furnished herewith in compliance with Rule 38 of this Court.

SUMMARY STATEMENT OF THE MATTER INVOLVED

Your petitioner, Ford Motor Company, was made defendant in a patent infringement action by respondent, the Gordon Form Lathe Company, as plaintiff, in the United States District Court for the Eastern District of Michigan, Southern Division, alleging infringement of the Gordon and Redlin, United States Letters Patent No. 1,542,803 granted June 16, 1925 (R. 1655-69). The patent relates to a lathe for turning so-called non-geometric articles and specifically the individual cams located in different angular positions along a camshaft for operating the intake and exhaust valves of an internal combustion engine in proper sequence. It was alleged that certain lathes purchased in the open market by the Ford Company from a manufacturer known as the Walcott Machine Company, constituted an infringement and that other machines, not lathes, but milling machines, developed by petitioner, and known as the Pioch milling machine, also infringed. The District Court in an unreported oral opinion held that both the Walcott lathes* and Pioch milling machines infringed the patent. On appeal to the Sixth Circuit Court of Appeals, the holding of infringement by the Ford Company as to the Walcott lathes was sustained but the holding of infringement by the Pioch milling machine was reversed (*Ford Motor Co. v. Gordon Form Lathe Co.*, 87 F. 2nd 390; R. 1358-65).

The case was then referred to a Special Master "to take and report an account of such profits, gains and

*These lathes are referred to in the record both as the "Walcott" and "Melling," the former being a contraction of the manufacturer's corporate name, while the latter is the surname of the inventor of the lathe. In this petition and supporting brief they are consistently referred to as the "Walcott" lathe.

advantages of the defendant, and the damages sustained by the plaintiff by reasons of said infringement, and to compute and report a reasonable royalty for the use of the said machines" (R. 3).

After due proceedings had, the Master rendered a report (R. 4-99) recommending that the respondent was entitled to its choice of the sum of $206,824.22 as profits allegedly realized by petitioner Ford Motor Company or $120,000 as reasonable royalty (R. 93). The said sum of $206,824.22 included the sum of $86,198.33 as savings of direct labor costs, to which was added the sum of $120,625.89 as alleged savings made by petitioner in overhead or burden costs. The entire manufacturing burden percentage, used by petitioner in its cost accounting system for determining *selling prices* of the unpatented products, made only in part by the use of the infringing machines, was *added* by the Master to the alleged savings of direct labor costs.

Both parties filed exceptions to the Master's report (R. 101, 103) and on final hearing the District Court disallowed the addition by the Master of the $120,625.89 as alleged savings of overhead or burden (R. 118), but in all other respects affirmed the Master (R. 1367-8, Par. 7 and 9).

Cross appeals were taken to the Sixth Circuit Court of Appeals (R. 1369, 1371, 1373, 1376). That Court in the judgment here sought to be reviewed in effect adopted the Master's report *in toto,* reinstating the item of burden $120,625.89 (R. Vol. V, 26).*

*The record here is in five volumes; volumes I, II, III and IV being paged 1 to 426 inc., 427 to 882 inc., and 883 to 1403 inc., and 1404 to 1700 inc., respectively containing the transcript of the evidence in the District Court, and Volume V, paged 1 to 26, containing the proceedings in the Court of Appeals.

In August 1922, respondent was engaged in selling its patented machines to users. Petitioner, Ford Motor Company, agreed to purchase one of them for $4,335.00 (R. 284; Ex. 56, R. 1691-92), and tried unsuccessfully to operate it. Finding, after a long period of experimentation, that it was not usable to cut the sharp nosed cams of Ford design, the machine was rejected by petitioner (87 F. 2nd 390 at 391, col. 2).

In the early part of 1924, the Ford Company purchased from the Walcott Machine Company, in the open market, a battery of eighteen of the lathes held to be an infringement (R. 1567-71, Exs. 217-220) and later, early in 1929, bought six more (R. 1572-73, Exs. 221-222). "These machines were designed by Herman W. Melling, a mechanic of considerable ingenuity and experience who, after having seen the unsuccessful operation of a patented Gordon machine at the plant of the Jackson Motorshaft Company in Jackson, Michigan, concluded it was wrong in principle, mode of operation and mechanism and that it could not be made to work properly. Melling designed his machines on the principle of operation of the old Blanchard lathes with which he was familiar" (*Gordon Form Lathe Co. v. Walcott Machine Co.*, 20 F. 2nd 673 at 674). After the issuance of the patent in suit on June 16, 1925, suit was brought by the respondent Gordon Form Lathe Company against the Walcott Machine Company in the District Court for the Eastern District of Michigan, Southern Division. Judge Simons, then District Judge, in a decision rendered July 22, 1927, held that the Walcott lathes designed by Melling followed the teachings of the Blanchard patent issued in 1819 and that they did not infringe the Gordon patent (20 F. 2nd 673 at 675).

On appeal to the Sixth Circuit Court of Appeals, Judge Simons' holding of non-infringement was reversed and the Walcott machines held to be an infringement (*Gordon Form Lathe Co. v. Walcott Machine Co.*, 32 F. 2nd, 55, opinion rendered April 12, 1929).

After the latter decision, as stated by the Court in its opinion in the case here sought to be reviewed, respondent—

> "The Gordon Company entered into a compromise settlement with the Walcott Company which had become financially involved. By the terms of the settlement the Gordon Company accepted $1.00 for all claims of infringement and waived an accounting. In an amended final decree the Walcott Company was ordered to pay the Gordon Company $4,000 costs" (R. Vol. V, 4).

Long before Gordon's invention, and as early as 1914, the Ford Company had adopted, and continuously used until 1924 (R. 7-8) for the production of millions of camshafts, for the old Model T Ford cars a machine known as a *shaper* (R. 142, 1098-99, Ex. 52, R. 1687; Ex. 62, R. 1694; Ex. 63, R. 1695). When the Ford Company changed from the manufacture of its Model T cars to the Model A Ford car in the latter part of 1927 all of the original Model T camshaft shapers had been replaced by the Walcott machines that were purchased by the Ford Company in 1924 and the shapers had been scrapped (R. 624). Although respondent knew of the Ford Company's use of the camshaft shaper for making camshafts (R. 319-20), it presented a record in its litigation against the Walcott Company (the manufacturers of the machines which the Ford Company purchased), in which it represented that, prior to the Gordon-Redlin invention, the only known way of rough machining camshafts was by the use of grinding

wheels, and thereby succeeded in having the Sixth Circuit Court of Appeals in that litigation (32 F. 2nd 55) hold the patent in suit to be a *pioneer* patent in cam cutting and its claims entitled to a liberal, broad interpretation.

Three uses were made by petitioner during the infringing period of the infringing machines for machining camshafts as follows: for the old *Model T* car from June, 1925, to January, 1929; for the *Model A* car, from November, 1927, to March, 1931; and for the *Fordson Tractor* from June, 1925, to March, 1928 (R. 94-95). Respondent knew of the use of the infringing machines from 1924 on (R. 368-9), but did not give notice of infringement until June 12, 1929 (R. 11). This suit was started November 29, 1930 (R. Vol. V, 5).

Throughout the accounting proceedings in the instant litigation, respondent agreed that the prior Ford camshaft shaper was a proper standard of comparison for the machining of the Model T camshafts, yet in an effort to support a claim of approximately a million dollars, it insisted that the worst and most costly standard of comparison, viz, the grinding method (by the use of Landis grinders) should be taken for the machining of the Model A Ford and Fordson tractor camshafts (R. 20). As to the Model A shafts the Master (R. 32), the District Court (R. 118), and the Court of Appeals (R. Vol. V, 19) in this litigation ruled against respondent's contention and accepted the shaper as a proper standard of comparison but refused to accept it for the tractor shaft, holding that as Ford had actually used the Landis grinder for the tractor shafts, this made the grinder the proper standard for these shafts (R. 35; & Vol. V, 19), the Court of Appeals contra to the rule of *Tilghman v. Proctor*, 125 U. S. 136, erroneously stating that—

> "The predicate of the standard of comparison is that the trespasser *would* have used the comparative device but for his infringement * * *" (R. Vol. V, 19).

Petitioner filed an account showing that, instead of deriving any profits, gains or advantages from the use of the infringing Walcott machines, it suffered a loss of approximately $96,000 as compared with the results of using the old shapers (R. Vol. V, 8). The difference between the Master's finding of some $86,000 savings and such loss is due largely to the fact that in the account rendered by petitioner there was included the cost of a straightening operation *actually employed* by petitioner when it used the Walcott lathes *but which straightening operation was not employed when it used the older Ford camshaft shapers* (R. 429, 436-441, 486, 500-1, 534-39, 543, 545-47, 652-56, 768-772, 1111; also Exs. M and N, 1432-1435).

In that part of his report affirmed by both the District Court and the Sixth Circuit Court of Appeals, the Master *found as a fact that the straightening operation was used by the Ford Company* (R. 40) but he refused to allow the extra cost of this operation, stating that petitioner could have made changes in construction of the infringing machines which *might have* eliminated the use of the extra straightening operation (R. 41). The Court below sustained the Master's finding on this point (R. Vol. V, 20-21).

Petitioner introduced in evidence the patents to Melling Nos. 1,512,995 (Ex. 312; R. 1171 & 1640-47), and 1,655,655 (Ex. 209; R. 382 & 1558-66), and showed that the inventions thereof were embodied in the infringing Walcott machines (R. 382-84, 387-88, 1171-2). Petitioner also in-

troduced evidence showing that the inclusion of the inventions covered by these two patents (recognized by the Patent Office to be patentably distinct over the claims of the Gordon-Redlin patent) *were entirely responsible* for those differences in operation between the infringing Walcott lathes which rendered them useful to and usable by petitioner (R. 782, 783, 794), whereas the patented Gordon machine was found to be unusable by and devoid of any utility to, petitioner (87 F. 2nd 390). As respondent made no effort to meet the above proofs, petitioner relying upon the many decisions of this court, such as *Mason v Graham,* 90 U. S. 261; *Keystone v. Adams,* 151 U. S. 139; *Westinghouse v. Wagner,* 225 U. S. 604; *Sheldon v. Metro-Goldwyn Mayer,* 309 U. S. 390, urged that respondent could not recover all of the alleged profits but only those "to which the complainant was justly entitled", and that the burden of proof rested upon respondent to apportion and prove the amount of profits attributable to the infringement (35 U.S.C.A. 70; RS. 4921). Respondent made no attempt to meet this burden but, claiming that the rule of apportionment does not apply to a case where the patent covers a unitary device (R. 60), it submitted no evidence on apportionment, relying solely on its legal contention that the doctrine of apportionment was not applicable here, and that therefore is was entitled to all the alleged profits (R. 69-70).

Although in the *Walcott* case, the Court below held the patent to be a pioneer, it was careful to state that the gist of the Gordon invention resided in the *means for tilting the lathe tool* as the work rotated so as to present the tool at all times on a line extending normal to the point of contact of the cutting edge of the tool with the work piece (32 F. 2nd 57, R. 1357) and in its later opinion the Court reiterated this holding and further held that

the patentees were not entitled to all means for producing the desired result (87 F. 2nd 392, 1st col.).

For the purpose of showing that the *tilting of the tool* was not essential in the operation of the infringing machines, petitioner offered in evidence (R. 1172) the Melling patent No. 1,634,550, granted July 5, 1927 (Ex. 313, R. 1648-52), in which the tool, instead of being maintained normal to the work by a tilting movement, is moved up and down in a straight-line, reciprocating path while being simultaneously moved horizontally back and forth from the work; and introduced evidence proving that a large number of lathes embodying the non-tilting tool construction of this patent was made by the Walcott Company (without suit or even threat of suit on the patent here in suit) and used extensively in the automotive industry and that by making the change from the tilting movement of the tool to the straight line movement thereof, the production of the lathes was increased (R. 1175).

The alternative amount of $120,000 awarded below as "reasonable royalty" is predicated upon the figure of $5,000 per machine for the use of twenty-four machines for but a fractional part of the life of the patent (R. Vol. V, 3 and 25). The evidence showed that although respondent sold a number of its patented machines, in no case did it ask for, or receive, a royalty for the use of the machines, but that instead all such machines were sold outright (R. 281-2)—free and unrestricted—for a lump sum selling price of $4,335 apiece which included an established royalty of 10% of said selling price paid to the patentee (R. 317-18) to cover the manufacture and sale as well as the use of each patented machine so sold. Petitioner's use of the infringing machines *ceased in 1931* (R. 95), whereas the patent ran until 1942.

JURISDICTION

1. This is a suit arising under the patent laws of the United States, Judicial Code, Sec. 24 (7) (28 U.S.C. 41 (7)).

2. The jurisdiction of this Court is invoked under Sec. 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U.S.C.A. 347).

3. The date of the judgment which petitioner seeks to have reviewed is Feb. 4, 1943.

4. Among the cases believed to sustain jurisdiction to issue the writ, where questions of federal law of far reaching public importance are involved, even where there are no conflicting decisions, are:

Muncie Gear Works v. Outboard Marine & Mfg. Co., 315 U. S. 759;
Mishawaka Rubber & Woolen Mfg. Co. v. Kresge Co., 316 U. S. 203;
Exhibit Supply Co. v. Ace Patents Corp., 315 U. S. 126;
Morton Salt Co. v. G. S. Suppiger, 314 U. S. 488;
Lincoln Engineering v. Stewart Warner Corp., 303 U. S. 545.

THE QUESTIONS PRESENTED

1. May a patentee, who obtains a judgment of infringement against a manufacturer, selling infringing machines to the public, enter into a voluntary compromise with such manufacturer releasing him, meanwhile with full knowledge of use of the infringing machines by a user, permit such use to continue without protest or notice, and then proceed to recover from such user for alleged profits and damages, when the patentee sold all of its patented machines outright with no restriction upon the use thereof?

2. In an accounting for alleged profits resulting from mere use of an infringing machine, may the cost of an additional operation, actually employed during the infringing use, be disregarded on the ground that had additional mechanism, not actually used, been employed, such additional operation might have been eliminated?

3. After the Master, the District Court and the Court of Appeals all adopted concurring fact findings, that the patented machine was not usable by petitioner and that the infringing machines which it did use contained additional patented improvements of others, and petitioner has shown these improvements were entirely responsible for the better performance of the infringing machine over the patented machine, is the respondent justly entitled to recover all of the profits which resulted from the use of such additional improvements?

4. After it has been shown that successful operation of the infringing machine, as compared with the unsuc-

cessful operation of the patented machine, resulted from additional patentable improvements, of others than the patentee, contained in the infringing machines and that the invention of the patent in suit was not essential, may a patentee who fails to carry his *burden of proof* to prove otherwise or to apportion profits, recover all alleged profits from an infringing user?

5. May a patentee who has sold commercially unsuccessful patented machines outright with no restriction upon the use thereof and who established and accepted a royalty payment of 10% of the sales price of such patented machines, recover from a user a sum not only greater than the selling price of the machine but ten times more, as damages, than his own established royalty?

6. May a total overhead burden percentage, added by a defendant to direct labor costs primarily for the purpose of ascertaining the selling price of unpatented products, made only in part by the use of an infringing machine, and covering huge expenditures for plant operations in no wise affected by the use of such infringing machine in place of a non-infringing one, be used to increase alleged savings in direct labor costs in a patent infringement accounting based upon use of an infringing machine?

7. May the provisions of 35 U.S.C.A. 70 (R.S. 4921) relating to reasonable royalty be construed broadly to permit an award of damages, where there is a failure to establish the statutory conditions precedent for such award and to prove that "the complainant has suffered damage or that the defendant has realized profits to which the complainant is justly entitled"?

REASONS FOR GRANTING THE WRIT

All of the questions presented relate to matters of great public importance, each of which either relates to an important question of federal law which has not been, but should be, settled by this Court, or to a federal question decided in a way probably in conflict with applicable decisions of this Court (Sup. Ct. Rule 38, Sec. 5-b), to-wit:

1. The Sixth Circuit Court of Appeals by its decision in this case decided a federal question never directly ruled upon by this court by placing its approval upon a practice by which a patentee, after obtaining a decree of infringement against a manufacturer, who has sold large numbers of infringing machines to the general public, may make a deal with such manufacturer to release the latter upon payment of $1.00 plus a substantial sum as "costs," so that the patentee may, by claiming that the doctrine of *Birdsell v. Shaliol,* 112 U.S. 485, applies, proceed against innocent purchasers in good faith in the open market of the infringing machines, meanwhile with full knowledge of such use permit it to continue without protest or notice and then proceed to procure manifold recoveries of sums many times greater than any recovery that could have been had from the real tort-feasor—the manufacturer.

2. The Court below in refusing to allow the cost to petitioner of an operation (found as a fact by the Master, the District Court and the Court of Appeals to have been actually employed by it in its use of the infringing machines) on the grounds that this additional operation might have been eliminated by the use of additional equipment, which was not actually employed by petitioner,

decided a federal question in a way that conflicts with the rule this Court laid down in *Tilghman v. Proctor,* 125 U.S. 136, namely that the amount of profits derived by infringers of a patent from the use of an invention "is to be ascertained by the manner in which they have conducted their business and not by the manner in which they might have conducted it."

3. The Court below in awarding all of the alleged profits made by petitioner to the respondent in the face of proof by petitioner that any profits resulted from the inclusion in the infringing machines of patented improvements not the property of respondent, decided a federal question in a way that conflicts with the applicable decisions of this Court in *Mason v. Graham, supra, Westinghouse v. Wagner, supra* and *Sheldon v. Metro-Goldwyn-Mayer, supra,* and also in conflict with its own decision in *Egry Register Co. v. Standard Register Co.,* 23 F. 2nd 438.

4. The Court below in awarding all of the profits to the respondent allegedly made by petitioner from the use of the infringing machines, after petitioner had introduced evidence showing that all of such profits resulted from the inclusion in the infringing machines of patentable improvements not the property of respondent, and evidence showing that the use of the alleged inventive features covered by the patent in suit was not essential to the satisfactory performance of the infringing machines, and where respondent failed to carry its burden to prove otherwise, decided a federal question in conflict with the decision of this Court in *Westinghouse v. Wagner, supra.*

5. The Court below has decided a question of great and paramount public importance, never directly passed upon by this Court, or by any other Court, and to the effect that a patentee of a *commercially unsuccessful* patented machine who sold his machines outright with no restriction upon the use thereof, and who accepted a royalty payment based upon 10% of the sales price of such patented machine, may recover many times more for the failure of his machine to operate efficiently than he would have received for the successful operation of the same.

6. The lower Court, by its judgment in this case holding that there should be added to alleged savings in direct labor costs the total manufacturing overhead or burden, (which petitioner added to direct labor costs primarily for ascertaining the selling price to be placed by it upon unpatented products of an infringing machine, and which overhead or burden included huge expenditures for all of petitioner's manufacturing operations, most of which could not possibly have been affected by the use of such infringing machines as compared to a non-infringing machine) has decided a question of paramount public importance never before directly ruled upon by this Court or by any other Court.

7. The lower Court by its judgment in this case has decided a question of paramount public importance, never before directly ruled upon by this Court, in making an award of reasonable royalty in the absence of proof "that complainant has suffered damages as the result of the infringement, or that defendant had realized profits to which the complainant is justly entitled," thereby disregarding the plain import of these permissive provisions

of the statute (35 U.S.C.A. 70; R.S. 4921)—that damage to the complainant or realization of profits by the defendant to which complainant is justly entitled—are conditions precedent which must exist before an award of reasonable royalty may be made.

Wherefore your petitioner respectfully prays that the writ of certiorari be issued to the United States Circuit Court of Appeals for the Sixth Circuit, to the end that this cause may be reviewed by this Court; that the judgment of the Circuit Court of Appeals be reversed; and that petitioner have such other and further relief as may be proper.

Respectfully submitted,

DRURY W. COOPER,
Attorney for Petitioner.

I. JOSEPH FARLEY,
Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

OPINIONS BELOW

The opinion of the Circuit Court of Appeals below is not yet reported. It is found at (R. Vol V, 2-26).

The opinion of the District Court on the accounting was delivered orally and has never been reported. It will be found at R. 118-131.

The Master's Report will be found at R. 4-99.

The opinion of the Circuit Court of Appeals on the main case on the issue of infringement will be found at 87 Fed. (2d) 390 (*Ford Motor Company v. Gordon Form Lathe Company*, R. 1358).

The opinion of the District Court in the main case on infringement was delivered orally and has never been reported.

GROUNDS ON WHICH JURISDICTION IS INVOKED

The date of the judgment to be reviewed and other details justifying jurisdiction are set forth at page 10 *ante* of the accompanying petition.

STATEMENT OF THE CASE

The foregoing petition contains a summary of the material facts necessary to an understanding of the reasons relied upon for the allowance of the writ as well as a statement of questions involved in the case. The matters presented for determination of this Court relate solely to questions of law.

SPECIFICATION OF ERRORS

The errors which petitioner will urge if the writ of certiorari is allowed are that the Court below erred:

1. In mulcting petitioner of a large sum based upon use of the machines, after respondent had settled with the manufacturer thereof for the manufacture and sale.

2. In disallowing the cost of an additional operation actually employed by petitioner in the use of the infringing machines.

3. In holding that respondent was entitled to recover all of petitioner's alleged profits resulting from the use of the infringing machines.

4. In holding that the respondent, who failed to carry the burden of proof to apportion profits and who offered no evidence at all on the subject, may recover all of the alleged profits, in the face of uncontradicted evidence of petitioner that the profits were due altogether to added patentable improvements not the property of respondent.

5. In holding that a total overhead or burden percentage covering huge expenditures made by petitioner for plant operations during the infringing period, and in no wise affected by the use of the infringing machines as compared with non-infringing machines, should be added to alleged savings in direct labor costs resulting from mere use of the infringing machines.

6. In granting an award of reasonable royalty in the absence of any proof that respondent had suffered any damages as the result of the infringement or that petitioner had realized profits to which respondent was justly entitled.

7. In awarding a recovery of $206,824.22 as alleged profits or alternatively $120,000 as reasonable royalty.

8. In failing to remand the case with instructions to the District Court to award nominal damages only.

ARGUMENT

This case presents unique questions of far-reaching public importance most of which have never before, as far as we are aware, been presented to any court.

It is believed that the questions presented and the reasons for granting the writ as set forth in the foregoing petition (pp. 11-16) sufficiently summarize the argument.

POINT 1. On the proposition that a patentee after making a compromise agreement with an infringing manufacturer may rely upon Birdsell v. Shaliol, supra, to mulct innocent customers of such manufacturer of much larger sums than any recovery obtainable from the manufacturer.

The facts hereinbefore set forth in the summary statement, show that, after the Court sustained the charge of infringement against the Walcott Machine Company from which petitioner purchased its infringing Walcott machines, in the language of the Court below, respondent,

> "• • • The Gordon Company entered into a compromise agreement with the Walcott Company which had become financially involved. By the terms of the settlement the Gordon Company accepted $1.00 for all claims of infringement and waived an accounting. In an amended final decree the Walcott Company was ordered to pay The Gordon Company $4000 costs" (R. Vol. V, 4).

The evidence shows, however, that the Walcott Machine Company continued in business and during the accounting (R. 564-5; 1172) was still making *inter alia*,

modified machines of the Melling patent (1,634,550, to which we will refer later) still using the Blanchard principle, and that the respondent did not pursue its remedy against the manufacturer of the infringing machines.

Respondent placed its reliance upon the old case of *Birdsell v. Shaliol, supra,* wherein this Court held that payment of nominal damages by the manufacturer of an infringing machine does not release the user thereof. But the facts in the Birdsell case were entirely different from those here. There the recovery against the manufacturer was limited *by the court* to nominal damages in the earlier suit. It was not a question of the infringing manufacturer and patentee making a deal whereby the latter voluntarily accepted (R. 970; Ex. 5, R. 1670-72) the payment of "nominal damages" plus a substantial sum as "costs" in order that he might then proceed against innocent purchasers in good faith for their *use* of the infringing machines, and mulct them of sums larger than any recovery he could possibly have obtained had he pursued his remedy against the infringing manufacturer.

Certainly this court never intended by its decision in *Birdsell v. Shaliol* to establish a precedent of such far reaching and potentially injurious consequences to the general public and industry. If this were the law, the patent system can readily be the means of stifling the industrial progress it is intended to promote, because in these days of highly developed labor-saving machine tools, no manufacturer nor farmer nor business man would dare purchase any labor-saving device except at the peril of having to turn over all the advantages he hoped to obtain, suffer the loss of his original investment therein, and in addition, be amerced a sum added to actual savings

of whatever overhead or burden figure he may have used for computing the selling prices of unpatented articles made only in part by the use of the infringing machines. Every farmer who replaces horse drawn equipment with a tractor having an infringing mechanism incorporated therein could be made to turn over all the savings made by its use as compared with the use of draft animals, plus an additional sum representing a part of the moneys he already paid for taxes, farm buildings and general upkeep and supervision of his farm.

Manifestly the patent law was never intended to permit such a result. Yet that is the very result that was accomplished here. The decision here invites a patentee, having actual knowledge that an infringing manufacturer who made machines in infringement of his patent and sold them to innocent members of the general public under a patent guarantee (Ex. 296, R. 1610), to make a deal with such manufacturer for the payment of nominal damages, meanwhile permitting innocent users to continue their use of the machines for years without giving them any notice, and finally collect from such purchasers many, many times more than the total sum of profits and royalty the patentee would have received if its machines, found unusable by such purchaser, had in fact been usable and the latter had bought the patented instead of the infringing machines.

Surely this practice—never before passed upon by this Court—is of such far reaching public importance as to warrant review and the authoritative approval of this Court if it is in accordance with law, or its stern disapproval of it if it is not.

POINT 2. On the proposition that an infringer is liable for actual and not possible gains.

The Court below decided a federal question in direct conflict with *Tilghman v. Proctor, supra,* wherein it was held:

> "The infringer is liable for *actual* but *not possible* gains. The profits, therefore, which he must account for, are not those which he might reasonably have made, but those which he did make by the use of the plaintiff's invention: * * * (125 U. S. 146).
>
> * * * *
>
> "And the question to be determined is, as stated by Mr. Justice Strong in delivering judgment in Mowry v. Whitney, 'what advantage did the defendant derive from using the complainant's invention, over what he had in using other processes then open to the public and adequate to enable him to obtain an equally beneficial result?' 14 Wall. 620, 651. In determining that question, the expense of using the new process is doubtless to be ascertained by the manner in which the defendants have in fact conducted their business, and not by the manner in which they might have conducted it" (125 U. S. 151).

That this still is the law, is shown by its adoption in the most recent pronouncement of this Court—*Sheldon v. Metro-Goldwyn Mayer,* 309 U. S. 390, at p. 400.

The uncontradicted evidence showed that petitioner in its use of the infringing Walcott machines employed an extra straightening operation not used or employed by petitioner when it used the standard of comparison machine—the Ford shapers (R. 429, 441, 486, 500-1, 534-39,

543, 545-47, 563-4, 652-56, 768-72; Ex. M, R. 1432-3; Ex. N, R. 1434-5).

The Master found that the extra straightening operation was in fact used, stating:

> "I therefore reject this operation as an element of the cost of using the infringing machines, *not on the ground that it was not added upon their installation* (*because I think it was*), but rather on the ground that its addition was not attributable to differences between the two machines" (R. 41).

But he refused to allow it on the ground that the "necessity of straightening *could have been eliminated by modification* of the steady rests or the addition of other steady rests" (R. 41).

The Master recognized the rule of *Tilghman v. Proctor* (R. 41) but refused to apply it, stating "that the actual operation of an infringing machine should not be weighed against a theoretically ideal operation of the standard of comparison" (R. 41-42). Then paradoxically he clearly based his refusal on an assumed theoretically ideal operation of the infringing machine. The District Court did not discuss this question while the Court of Appeals held:

> "The Master found that the Ford Company used an additional straightening operation on the shafts after it began using the infringing Melling-Walcott machines and that the labor cost thereof was the amount claimed by the Ford Company in its accounts * * *" (R. Vol. V, 20).

But the Court of Appeals in affirming the Master apparently did not recognize the correct rule of law enunciated by *Tilghman v. Proctor, supra,* as, like the Master, it refused to follow the rule but rested its affirmance on

the proposition that the legal presumption (as to fact findings) is in favor of the Master's report (R. Vol. V, 20-21).

The judgments of the Master, the District Court and the Court of Appeals therefore in refusing to allow the cost of an operation actually used, in reality based their refusal on the grounds that the infringing machines *might have been altered* to make such operation unnecessary, which is directly *contra* the rule of *Tilghman v. Proctor, supra,* that an "infringer is liable for *actual but not possible gains.*" "* * * *not those which he might reasonably have made, but those which he did make*"; and that "the expense of using the new process is doubtless to be ascertained by the manner in which the defendants *have in fact conducted their business and not by the manner in which they might have conducted it.*"

This departure from the rule presents a question of paramount public importance in that it substitutes speculation for facts, in a patent accounting, the very thing that the rule of *Tilghman v. Proctor* was enunciated to prevent.

POINT 3. On the proposition that respondent offered no proof to show what part of petitioner's gains were due to respondent's patent, and what to patentable improvements thereon not the property of respondent, whereas, petitioner's evidence did so discriminate.

This court in the recent case of *Sheldon v. Metro-Goldwyn Mayer, supra* (a copyright case), in discussing the question of apportioning profits applied broad equitable principles thereto and cited from *Westinghouse v. Wagner, supra,* as follows:

> "The owner of a small part of the fund is as much entitled to the protection of the law as the owner of a larger share. This rule is not intended to penalize the infringer nor to give the patentee profits to which he clearly is not entitled" (225 U. S. 620).

The Court then stated that profits are granted—

> "* * * in accordance with the principles governing equity jurisdiction, not to inflict punishment but to prevent an unjust enrichment by allowing injured complainants to claim that which *ex aequo et bono,* is theirs, and nothing beyond this" (309 U. S. 399).

> "and that to make an award of profits which have been shown not to be due to the infringement would be * * * not to do equity but to inflict an unauthorized penalty" (309 U. S. 405).

also, that when the complainant receives all the profits which have been

> "gained through the use of the infringing material * * * that is all that the statute authorizes and equity sanctions" (309 U. S. 406).

In the instant case, petitioner showed that the patented machine was not only commercially unusable by it, but that others, Jackson Motorshaft Company (R. 1261-4) and International Harvester Company (R. 1132-34) had the same experience with it and that both of these companies went back to the expensive grinding in preference to, and as less costly than, the patented Gordon machine. The Court of Appeals held the patented machine was not usable by petitioner. The Master held the facts to be—

(a) The Gordon machine was impracticable for machining the Ford camshafts (R. 61).

(b) "The Walcott machines (used by petitioner) had two improvements over the Gordon machine devised by its designer, Melling, upon which he obtained patents subsequent to the issue of the Gordon patent" (R. 62), and that "*It seems clear that without these improvements no savings would have been realized by the defendant, at least by comparison with the shaper.*" (Petitioner's prior machine.) (R. 62). (Italics ours.)

The Court of Appeals in substance found the same facts (R. Vol. V, 10).

The decision of the Court of Appeals is also in direct conflict with *Mason v. Graham* (90 U. S. 261).

There the court held that the defendant's machine "performed the same functions and in substantially the same way as complainant's and that the defendant's picker-staff-motion must be considered as practically the same as that patented to the complainants" (90 U. S. at 275).

But the Court held that as the defendant, by using a pattern* of its own devising, had made a savings of 50 cents in the cost of making the infringing devices: "manifestly the complainants are not entitled to the savings or profits resulting from the defendant's own invention" (90 U. S. 276-7).

As to this case the Master stated—

> "it seems to be in point here; and *if followed requires a decision in favor of defendant on the issue*" (R. 67). (Italics ours.)*

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*The decision of the lower court, *Mason v. Graham*, 10 Fed. Cases 931, held the "pattern" to be an infringement and awarded all of the profits.

Instead of following the rule of *Mason v. Graham* however, the Master stated—

> "Thus, the authoritative cases seem to point to conflicting conclusions on the issue of the right to apportionment in this case, although there is perhaps a slight edge on defendant's side in those most closely in point" (R. 68).**

Petitioner's evidence showed that the patentable improvements of Melling in the infringing Walcott machines were wholly responsible for the improved performance of them over the patented Gordon machine (R. 780-94), which was unusable by petitioner. Petitioner thereby followed strictly every rule, as to burden of proof, laid down by this Court in *Westinghouse v. Wagner, supra,* which the Master discussed (R. 64-66) and recognized, but which he refused to follow (R. 68-69).

Respondent, however, as found by the Master—

> "submitted no evidence to separate the respective contributions of the two patents, relying upon its legal contention that the doctrine of apportionment is not applicable here" (R. 69-70).

The Master then found:

> "The situation here is similar to that in Egry v. Standard Register Co., in this circuit, where the

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**Respondent urged, and the Master seems to have been influenced by the argument that *Mason v. Graham* was impliedly overruled by *Duplate v. Triplex, infra. Mason v. Graham* was neither cited in the *Duplate* case nor does the latter deal with the question of apportionment. But it was cited with approval by this Court in the later case of *Sheldon v. Metro-Goldwyn Mayer, supra,* which dealt directly with such question. Hence it is clear that *Mason v. Graham* has neither been directly nor impliedly overruled.

> Court held that the record showed no reasonable basis of apportionment" (R. 71).*

He then concluded:

> "Resorting to the books of the defendant would be of no assistance on the issue; the confusion is not related to the books at all. Consequently I conclude that the plaintiff is entitled to all the profits; as between that alternative and allowing the plaintiff none, that is the fairer result" (R. 71).

It will be seen, therefore, that although the Master recognized the rule of *Westinghouse v. Wagner* and *Mason v. Graham,* he not only refused to follow either but also refused to follow the rule of the *Egry* case and rested his judgment, not upon the rule of any authoritative case, but merely on the broad general proposition that as between the alternative of giving the respondent all the profits (to which it manifestly is not entitled), or giving it none, he preferred to give it all.

The District Court did not discuss the question of apportionment, while the Court of Appeals based its refusal to apply the doctrine on the ground that petitioner had failed to carry its burden of proof (R. Vol. V, 12); this in the face of the uncontroverted facts; as found by the Master (R. 69-70) that respondent offered no evi-

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*In the *Egry* case, 23 F. 2nd 438 (C.C.A. 6), it was found that "an apportionment being necessary, the burden is upon the plaintiff to make it, or show a sufficient excuse for not doing so. * * * under the facts of this case, a substantially accurate apportionment would be a physical and mathematical impossibility; but there was no effort by plaintiff to utilize expert testimony for this purpose" (23 F. 2nd 442). The Court therefore held the entire profit should not have been awarded and that as the plaintiff had full and sufficient opportunity to apportion the profits, but failed to do so, no profits should be awarded.

dence whatsoever on the question of apportionment, while petitioner showed affirmatively that it was Melling's added improvements which made the infringing machine capable of use by it (R. 780-94).

The Court of Appeals therefore decided a federal question in conflict with the appropriate decisions of this court in *Dowagiac Mfg. Co. v. Minnesota Moline Plow Co.* (235 U. S. 641), *Mason v. Graham* (*supra*), *Westinghouse v. Wagner* (*supra*), *Sheldon v. Metro-Goldwyn Mayer* (*supra*), and also in direct conflict with its own decision in *Egry v. Standard* (*supra*).

POINT 4. On the proposition that machines without the patented improvement did as good service as those embodying it.

Petitioner introduced in evidence the Melling patent 1,634,550 (R. 1648-52), in which a straight line up and down movement of the cutting tool is substituted for the tool tilting movement found by the Court of Appeals to constitute the gist of the Gordon invention and showed that a large number of machines embodying this straight line movement were being used—without assertion of infringement by plaintiff—and that the output of the machines was increased rather than decreased (R. 1175), thereby showing that tilting movement of the tool was not necessary or essential to the successful operation of the infringing machines.

In deciding that petitioner had failed to carry its burden of proof after petitioner had shown (a) that the infringing machines contained the later patentable improvements of Melling, (b) that such improvements were entirely responsible for the improved performance of the

infringing machines over the patented machine, the infringing machines being usuable by petitioner while the patented ones were not, (c) that the invention of the patent in suit was not essential to the successful operation of the infringing machine and (d) in the face of the total failure of respondent to offer any evidence on the subject of apportionment,—the Court of Appeals in failing to award but nominal damages decided a federal question in conflict with the decisions of this court in *Keystone v. Adams, supra, Garretson v. Clark* (111 U. S. 120), *Dobson v. Hartford* (114 U. S. 439).

POINT 5.—On the proposition that a patentee may recover many times more for failure than for success.

Respondent offered to sell petitioner its patented machine for $4,335 (R. 317; Ex. 56, R. 1691) and guaranteed that the machine would operate satisfactorily. After a long period of experimentation the machine had so thoroughly demonstrated its impracticability and unusability that petitioner was forced to return the machine (R. 361) as the Court below found (87 F. 2nd 390 at 391).

Petitioner in cross examination of respondent's inventor and president Gordon, after he had denied the payment of any royalty to him on the patented Gordon machines sold by respondent (R. 281), brought out from him the admission, after he was confronted with the entries in respondent's books of account, that a royalty based on 10% of the sales price had been paid on every one of the patented machines sold by respondent (R. 318). This royalty was established and followed throughout respondent's entire active business life, and it covered both manufacture and sale as well as the full free and

unrestricted use of the patented machines for the entire seventeen year life of the patent. Respondent thereby placed its own evaluation on its invention.

Petitioner was entirely willing to buy respondent's machine and to pay the full sales price therefor, including the royalty if such machines were usable by it. Yet because such machines were a complete failure respondent has claimed it is entitled to approximately a million dollars (R. 316) and the Court of Appeals has awarded nearly a quarter of a million dollars for petitioner's mere use of the infringing Walcott machines, including therein all of the savings or advantages thereof resulting from patentable improvements which do not belong to respondent but were contributed solely by the later inventions of Melling.

The only evidence offered by respondent that furnished any basis for the Master's alternative award of $5,000 per each infringing machine as reasonable royalty (R. 80) was the *settlement* agreements made by respondent with the White Motor Company, the Nash Company and the Case Company *long after the beginning of the infringing period* and therefore clearly not admissible under the rule of *Rude v. Westcott*, 130 U. S. 152.

These agreements contained a provision they were not to be used to determine the extent of liability in any future litigation (R. 964-968, 1529, 1542, 1545-6, 1550), thereby rendering them even more clearly inadmissible. It was further testified to by the former secretary of the White Motor Company (called as a witness by petitioner) that "it was not at all a question of royalty or reasonableness" (R. 523) and that he was settling "with a gun at his head" (R. 522).

In view of these undisputed facts no award of royalty over and above respondent's own evaluation of its patent as 10% of the sales price of a machine can be either legal, logical or reasonable. And even as to this, due consideration should be given to the facts that (a) had it pursued its remedy against the Walcott Company instead of making a compromise settlement with it, respondent's established ten percent royalty would have been a part of its measure of damages against Walcott, and (b) that petitioner's use of the infringing machines was but for a fractional part of the life of the patent since it ceased in 1931 whereas the patent ran until 1942.

This is a question of paramount public importance never directly passed upon by this Court.

POINT 6. On the proposition of adding a total overhead or burden percentage to alleged direct labor savings.

The Master in discussing the question of *overhead or burden* stated:

> "In considering the authorities on the proper method of determining savings of this type, I have found no reported patent cases where the defendant's profits were determined, as here, by the standard of comparison method which discuss the treatment of overhead savings as such, but consideration is given to overhead if at all, only in terms of its elements" (R. 49). (Citing *Morgan Construction Co. v. Forter-Miller Engineering Co.*, 234 F. 327)* (R. 50).

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*(This case was one, however, where the cost of an additional operation used with the patented construction was allowed as an element of *cost.*)

Manifestly in a case where profits are determined by the standard of comparison method, it is *those elements of overhead and only those which would be directly affected by the change from the use of the infringing machine to the standard of comparison machine that should be taken into consideration.* Yet the Master added as *savings* a total manufacturing overhead or burden percentage which under any system of accounting never represents anything but *inevitable expense.* The Court below in a footnote (R. Vol. V, 22) listed those items, the cost of which, in order to establish selling prices, were added by petitioner to direct labor costs on a percentage basis. Examination of this list of items shows immediately that practically all of them would be entirely unaffected by the change from the use of but eighteen machines and nine men per eight-hour shift for the major part of the infringing period as compared with the suppositious use of approximately the same number of another type of machine and operators therefor in respondent's River Rouge plant containing several thousand machines and many thousands more of employees.

The Master could find no case (and the Court below cites none) which supported his position because all of the patent accounting cases for infringement, where *total* overhead or burden is considered, are those involving manufacture and sale as distinguished from mere use, and in those cases *it is always allowed as a deduction.* He ruled that as petitioner applied a total overhead burden figure to direct labor costs in its accounting practice in order to ascertain selling costs it was in effect bound by its own accounting practices. He referred to general accounting practice of applying overhead percentages to direct labor costs, and cited this Court's lan-

guage in *Duplate v. Triplex* (298 U. S. 448, 468) in support of his holding (R. 57).

The practice of adding a total overhead or burden to direct labor costs in any manufacturing plant to determine *selling* prices of unpatented products obviously bears absolutely no relation to the *comparative manufacturing costs of two different machines* for performing the same operation in making such products.

The District Judge in his oral opinion (R. 118-31) clearly recognized the distinction. As so aptly stated by him:

> "In the first place, I do not think that a defendant's own books, or anyone else's books are binding upon them as to results for which they are not kept. And I do not think that is in conflict with Judge Cardozo's decision" (R. 121)*.

He carefully analyzed some of the items such as supervision and taxes and then further correctly stated that the addition of the total overhead burden worked "a very unjust result" (R. 123) and reversed the Master on this point.

The holding of the Master and the Court of Appeals with respect to this addition of a total overhead or burden percentage is not a fact finding, but an attempted application of a rule of law from cases dealing with *selling prices* of infringing manufactured products, to an altogether different type of case dealing with *savings*, resulting from the mere use of an infringing machine as com-

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*This reference by the District Judge is to Mr. Justice Cardozo's opinion for the Court in *Duplate v. Triplex*, 298 U. S. 448, 468 which was strongly urged upon him in argument by counsel for respondent.

pared with the suppositious use during the infringing period of a standard of comparison not actually used in said period but which was clearly available for use. That the situations are not at all analogous is evident from the fact that in the first type of cases, overhead if properly proved and allocated is always allowed as a *deduction* from gross profits, here however it is used to *pyramid* alleged savings (R. 1015); with the result that if the decision below on this point is affirmed petitioner will be amerced $120,000 in addition to such inescapable expenses as taxes, etc. for which fixed sums were actually paid by petitioner during the infringing period and the amount of which sums could not have possibly been varied either up or down by the substitution of one machine for another.

We submit it to be perfectly clear that even if the purely fictitious saving of $86,000 in direct labor costs were made by petitioner by its use of the infringing machines as compared with supposititious use of a standard of comparison machine, during the five year infringing period, it cannot possibly be logical to assume that petitioner would have spent $120,000 less for taxes, locomotives, freight cars, insurance, etc., etc., simply because in order to establish selling prices, petitioner added an average burden percentage of 140% to direct labor costs to take care of and properly allocate the total general manufacturing expenses actually incurred by it during those years in maintaining and operating its whole River Rouge Plant.

As the question here under discussion is one of great public importance that has never been directly ruled upon by this Court, or by any other Court outside of the instant

case, it is respectfully submitted that the judgment of the Court of Appeals, which may be employed to establish a harmful precedent, calls for review by this Court.

POINT 7. As to Damages:

The doctrine of reasonable royalty was written into the statute by the revision of Section 4921 R.S. (35 U.S.C.A. 70), by the act of February 18, 1922.

For convenience in discussion, we have interjected reference numerals in the text of the statute and use italics to emphasize the conditions under which it may be applied:

> "* * * If on the proofs it shall appear (1) that complainant *has suffered damage* from the infringement, or (2) that the defendant *has realized profits* therefrom (3) *to which the complainant is justly entitled,* (4) *but that* such damages or profits are not susceptible of calculation and determination with reasonable certainty, *the court may,* (5) on evidence tending to establish the same, in its discretion, receive opinion or expert testimony, which is hereby declared to be competent and admissible, subject to the general rules of evidence applicable to this character of testimony; and *upon such evidence and all other evidence in the record,* the court may adjudge and decree the payment by the defendant to the complainant of a *reasonable sum* as profits or general damages for the infringement * * * ."

The statute clearly sets forth certain conditions precedent for assessment of reasonable royalty, as follows:

(1) "that the complainant has suffered damage from the infringement, or"

(2) "that the defendant has realized profits therefrom"

(3) that such profits must be those "to which the complainant is justly entitled"

(4) "that such damages or profits are not susceptible of calculation and determination with reasonable certainty.

(5) that "the court may on evidence tending to establish the same * * * receive opinion or expert testimony * * * and upon such evidence and all other evidence * * * decree the payment * * * of a reasonable royalty."

As far as the *first condition precedent* is concerned no proof of any actual damage whatsoever was offered by respondent. It offered its patented machines to petitioner; they would not serve their intended purposes, as all the tribunals have held (*supra* p. 4) and on that account they were rejected.

As to the *second condition precedent;*—if the correct rule of law (*Tilghman v. Proctor, supra*) is applied, and the costs of operation of the infringing machines, as compared with defendant's earlier cam shaft shapers, is computed by reference "to the manner in which the defendant actually conducted its business and not by the manner in which it might have conducted it" (125 U.S. at page 151) *the cost of the additional straightening operation must be added* with the result that petitioner *suffered a loss* by using the infringing machines *rather than realizing a profit.*

As to the *third condition precedent;*—even if this court's established rule in *Tilghman v. Proctor* be disregarded and alleged profits are predicated, not upon petitioner's actual use of the infringing machines, but upon the grounds that it might have used them more efficiently had

it changed their construction, the query remains—"Is the complainant justly entitled to these alleged profits?" In the face of the record showing that all advantages to petitioner of the infringing machines resulted from Melling's later patented improvements, and the Master's fact finding (concurred in by both the District Court and the Court of Appeals) "*that without these two improvements no savings would have been realized by defendants*", (R. 62) it is clear that even if the rule of *Tilghman v. Proctor* be disregarded and the extra cost of the straightening operation be disallowed, still respondent is not justly entitled to the alleged (*but purely fictitious*) profits. Respondent's patented machine built strictly in accordance with the disclosure of its patent in suit (R. 347-50) (which must under the statute disclose the inventor's *best embodiment*) and which therefore contained physically all Gordon and Redlin *actually invented* as distinguished from the esoteric definition thereof as contained in the claims of the patent was, without more, not usable by, and of no utility to petitioner. The infringing machines, which differed from the patented machines by the inclusion of Melling's later and patented improvements, were usable by petitioner, therefore the alleged but fictitious profits resulting from the Melling machines could not possibly be those to which respondent is justly entitled.

The record shows that giving the patented machine the benefit of every doubt, its potential output in machining petitioner's cam shafts did not exceed five shafts per hour (R. 630). It necessarily follows that any output which petitioner obtained from the infringing machines in excess of five shafts per hour must have clearly resulted entirely from Melling's contributions. It is equally clear that respondent is not justly entitled to claim the benefit of sav-

ings or advantages of patentable improvements not made by Gordon and Redlin but by a later inventor.

Hence, since all of the first three conditions precedent of the statute (R.S. 4921) are clearly lacking, there is no basis for an award of reasonable royalty in this case except by disregarding the clear and unequivocal provisions of the statute.

As to the *fourth condition precedent,* the Master as well as the accountants for both parties prepared accounts in which profits and loss were calculated and determined with remarkable accuracy and certainty (Schedule "C", R. 99 and Ex. "C", R. 171-195; Exs. "Z3" to "Z7", R. 1493-1523).

As to the *fifth condition precedent*: *although no proper* foundation for the reception of opinion evidence was laid as evidenced by the foregoing, respondent did offer opinion evidence on the subject of a royalty of so much per shaft produced—the unpatented product of the machine. It offered no evidence, opinion or otherwise, on what a reasonable royalty on the machine (the thing covered by the patent as distinguished from its unpatented product) would have been *at the beginning of the infringing period.* Instead it offered evidence clearly inadmissible under *Rude v. Westcott, supra,* of settlement agreements made by it with others *but not entered into until nearly the termination of petitioner's infringing period.*

Hence none of the five conditions precedent of the statute were met or complied with to warrant an award of a lump sum of $5,000 per machine. Moreover a royalty of over 100% of the gross selling price of a machine could hardly be termed *reasonable* in accordance with the plain intent of the statute.

CONCLUSION

On the foregoing argument, it is submitted that the Circuit Court of Appeals was in error in the several respects covered by the petition and brief; that its errors are in matters of wide and general importance; that it has departed from the rules prescribed by this Court; and that its judgment is entirely erroneous.

Wherefore your petitioner prays that its petition be granted; that the writ of certiorari be issued and the cause reviewed; and that the decree of the Circuit Court of Appeals for the Sixth Circuit be reversed.

Respectfully submitted,

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